Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-892

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR KINOY, PETITIONER

v.

CLYDE A. TOLSON, AS EXECUTOR OF THE ESTATE OF J. EDGAR HOOVER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, an attorney who was incidentally overheard during the course of warrantless national security surveillance directed at others between 1949 and 1970, has a cause of action for damages to redress these alleged violations of his Fifth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 851 F.2d 591. The opinion of the district court denying rehearing and granting leave to pursue an interlocutory appeal under 28 U.S.C. 1292(b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1988. On September 22, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 28, 1988. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nearly two decades ago, in 1970, petitioner Kinoy, a civil rights attorney, brought this action against the United States and several former federal officials in their individual capacities, alleging that he had been the subject of unlawful electronic surveillance between 1949 and 1970 (Pet. App. A3-A4). Petitioner sought damages and declaratory and injunctive relief.

The government admitted that petitioner had been overheard during the course of surveillance, directed at others, that had been conducted without a judicial warrant for purposes of national security (Pet. App. A3-A4). In discovery, it produced telephone logs of the intercepted conversations in which petitioner participated (*id.* at A4). See C.A. App. A227-A372. The district court later found that petitioner was not the target of electronic surveillance (Pet. App. A4 n.2), but that he had been overheard on 23 occasions in connection with national security intelligence investigations of other persons (C.A. App. A96).

For six years, from 1979 to 1985, the case lay completely dormant. Then, in *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), this Court held that federal officials were entitled to qualified immunity from claims for damages under the Fourth Amendment allegedly arising from warrantless domestic security wiretaps prior to 1972, because the applicability of the Fourth Amendment's warrant requirement to such surveillance had not been clearly established until this Court's decision in *United States* v. *United States District Court,* 407 U.S. 297 (1972). Thereafter, the district court asked whether petitioner wished to pursue his action in view of *Forsyth* (Pet. App. A4).

When petitioner indicated that he did, respondents moved, *inter alia,* for summary judgment. Apparently recognizing that *Forsyth* barred his Fourth Amendment

claims, petitioner sought leave to amend his complaint to allege new statutory causes of action (C.A. App. A123). At oral argument on these motions, he withdrew his request for leave to amend when the district court suggested that the new complaint might be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure (Pet. App. A5). Petitioner then advanced the contention that respondents might have used the intercepts against his clients in some manner giving rise to a claim under the Fifth and Sixth Amendments (*id.* at A4-A5). Although he presented no evidence to the district court in support of this new theory, the court denied respondents' motion for summary judgment "without prejudice to renewal" as to petitioner's Fifth and Sixth Amendment claims (C.A. App. A58). See Pet. App. A5, A10.[1] The court permitted petitioner to take further discovery with respect to those claims (C.A. App. A61).

Respondents moved for reconsideration and, in the alternative, for leave to take an interlocutory appeal under 28 U.S.C. 1292(b). The district court denied the motion for reconsideration, but granted leave to appeal (Pet. App. A10-A15). Respondents noticed an appeal as of right from the court's refusal to uphold their defense of qualified immunity and obtained leave from the court of appeals for an interlocutory appeal with respect to other issues (C.A. App. A394).[2]

[1] The court refused to uphold respondents' defense of qualified immunity as to those newly asserted claims because petitioner had suggested "a distinction • • • which takes them out of Forsyth" (C.A. App. A55). The court indicated, however, that it did not at that point agree or disagree with that distinction (*ibid.*).

[2] After these appeals had been taken, petitioner entered a stipulation with the government under which, *inter alia*, (1) the government represented that petitioner was not then the subject of any surveillance, (2) the government promised, without conceding that any prior surveillance had been unlawful, not to undertake any electronic sur-

2. The court of appeals reversed (Pet. App. A1-A9). Without reaching the question whether respondents were entitled to qualified immunity from petitioner's Fifth and Sixth Amendment claims, the court concluded that petitioner had not stated a claim for damages under those provisions (Pet. App. A6, A9). The court noted that petitioner was not seeking to vindicate his clients' rights under the Constitution (*id.* at A6), and held that petitioner, "as an attorney, possessed no constitutional right, independent of his clients' rights, to communicate with the clients without government intrusion when national security interests were at stake" (*id.* at A9). The court noted that the Sixth Amendment's guarantee of the assistance of counsel, on its face, secures no right personal to the attorney (*id.* at A7). In the Sixth Amendment cases relied on by petitioner, the court continued, "either a criminal defendant was asserting a right to communicate confidentially with his attorney, or a court was concerned that interception of attorney-client conversations had deprived a convicted defendant of a fair trial" (*id.* at A7-A8). The court of appeals also distinguished cases in which a doctor or attorney had been granted standing to seek declaratory and injunctive relief to vindicate the rights of a patient or client, explaining that petitioner was seeking only damages (*id.* at A8-A9). The court remanded the case with a direction to dismiss the complaint (*id.* at A9).

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veillance of petitioner or co-plaintiff Joanne Kinoy, petitioner's daughter, except pursuant to lawful authority, (3) petitioner's claims against the United States were dismissed with prejudice, (4) petitioner's claims for declaratory and injunctive relief against all defendants were dismissed with prejudice, and (5) all of Joanne Kinoy's claims were dismissed with prejudice. C.A. App. A395-A398. Thus, in the court of appeals, only petitioner's entitlement to damages from the individual defendants was in issue.

ARGUMENT

The court of appeals correctly concluded that petitioner has no right to recover damages allegedly attributable to respondents' violations of his or his clients' constitutional rights. There is no conflict between the court of appeals' decision and the decisions of any other court of appeals or of this Court, and petitioner's arguments mistakenly equate the showing necessary to establish standing with the elements of a claim for damages. In any event, petitioner's claims under the Fifth and Sixth Amendments—which were first articulated some 17 years after this action was filed in an attempt to avoid dismissal of the action on the authority of *Mitchell* v. *Forsyth*—are not sufficiently concrete to warrant this Court's review.

1. Petitioner seeks review of the question whether he has a Fifth Amendment right to damages for alleged violations of the Sixth Amendment rights of his clients (see Pet. i). However, as the court of appeals explained, the Sixth Amendment provides a right to the client—specifically, the right of "the accused" in "all criminal prosecutions" to "have the assistance of counsel for his defense." U.S. Const. Amend. VI. It does not, by its terms, confer a right on the lawyer to recover damages corresponding to interference with assistance provided to the client, and no case cited by petitioner suggests otherwise.

The Fifth Amendment is not a bootstrap by which petitioner can recover damages corresponding to alleged violations of his client's Sixth Amendment rights. And except for advancing this untenable theory, petitioner has not specified the legal or factual basis for any claim for damages that he might have under the Fifth Amendment. Indeed, the amended complaint, filed in 1971 (C.A. App. A72-A85), contains no hint of this theory, or of any factual basis for it, anywhere in its five causes of action. The

court of appeals was not obligated to divine and recognize petitioner's wholly unarticulated Fifth Amendment claim.[3]

2. With respect to the merits of petitioner's claim for damages, there is no conflict between the court of appeals' decision and the Eighth Circuit's decision in *Wounded Knee Legal Defense/Offense Committee* v. *FBI*, 507 F.2d 1281 (8th Cir. 1974). See Pet. 9. In that case, a group of lawyers had been formed to provide legal aid to criminal defendants in cases growing out of the incident at Wounded Knee; the lawyers alleged that FBI agents were interfering with their attempts to represent their clients, and sought a preliminary injunction prohibiting any further harassment. 507 F.2d at 1283. The district court denied a preliminary injunction, and the lawyers appealed. The court of appeals affirmed the denial of the preliminary in-

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[3] Moreover, even were such a theory tenable and were there facts shown or alleged that might support it, it is evident that in the circumstances of this case no "clearly established" constitutional right of an attorney under the Fifth Amendment was violated in the period (1949-1970) when the events in suit occurred. *United States* v. *United States District Court*, which for the first time applied the Fourth Amendment's warrant requirement to domestic security wiretaps, was not decided until 1972, and the only lower court decision prior to that time that lends any support to petitioner's constitutional theory is *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951), a decision by a divided court reversing a *criminal* conviction on the basis of an intentional wiretap of pretrial communications between the criminal defendant and her attorney. This Court did not clarify the elements of a criminal defendant's right of action under the Sixth Amendment for allegedly unlawful government surveillance until *Weatherford* v. *Bursey*, 429 U.S. 545 (1976). That decision, however, did not address the right of a defendant's attorney, if any, to obtain relief in that situation. Thus, respondents' claim of qualified immunity is a strong one. (Indeed, the plaintiff in *Mitchell*, who was a defendant in a criminal case, had specifically alleged a Sixth Amendment claim in his complaint. See Joint Appendix at 19, 21, *Mitchell* v. *Forsyth*, *supra*).

junction, but found that a lawyer had *standing* to "challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel." *Id.* at 1284. The Eighth Circuit's ruling was carefully limited. It determined only that the claim was "justiciable," noting that the "merits of the case," including the existence of the lawyers' alleged right "to provide effective assistance of counsel to their Indian clients," were "not yet determined" (*ibid.*).[4] An appeal from the denial of a preliminary injunction provided no occasion, of course, to consider whether an attorney could recover damages based upon an alleged violation of a client's Sixth Amendment rights. In *Wounded Knee,* therefore, the Eighth Circuit did not and could not have reached the issue resolved by the court of appeals in this case.

More broadly, petitioner confuses the showing necessary to establish standing with the requirements of a claim for damages. See Pet. i-ii, 10-15. The question whether a plaintiff has alleged "injury in fact" and an "interest * * * arguably within the zone of interests to be protected or regulated by the * * * constitutional guarantee in question" is quite distinct from whether he can demonstrate a violation of a legal right that is compensable in damages. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp,* 397 U.S. 150, 152-153 (1970). As *Camp* makes clear, a showing of an entitlement to relief on the merits is not necessary to establish standing. By the same token, a showing of standing does not foreclose a decision that a plaintiff has failed to state a claim, the

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[4] Similarly, the portion of *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), on which petitioner relies addressed only the standing of physicians to challenge the constitutionality of a hospital resolution prohibiting the use of hospital facilities for abortions. Pet. 12-13.

ground on which the court of appeals dismissed petitioner's claim for damages.[5]

Petitioner's reliance on cases addressing the doctrine of *jus tertii*—standing to argue the rights of third parties in challenging the constitutionality of a statute or official action—is completely off the mark. See Pet. 15-20. In *Singleton* v. *Wulff, supra,* four Members of the Court joined in the conclusion that doctors challenging a statute restricting the use of Medicaid funds for abortions could invoke the rights of their patients in arguing that the statute was invalid. Even these Members of the Court recognized, however, that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." 428 U.S. at 114 (quoting *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953)). Nothing in this case, or others permitting professionals to assert the rights of patients or clients in challenging the constitutionality of statutes or other official actions, suggests that a party may recover damages corresponding to a denial of another person's rights. See Pet. 20-23. Actions seeking damages for alleged deprivations of constitutional rights are governed by the principle "that a person should be compensated fairly for injuries caused by the violation of *his* legal rights." *Carey* v. *Piphus,* 435 U.S. 247, 257 (1978)

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[5] The cases on which petitioner relies illustrate the point. For instance, in *Singleton* v. *Wulff,* 428 U.S. 106, 112-113 (1976), the Court found that physicians had standing to challenge a state law prohibiting Medicaid reimbursement for abortions that were not "medically indicated," because if the doctors prevailed in their challenge they would obtain payment for such abortions. A finding that this interest presented a "case or controversy," however, did not remotely suggest that the doctors had a legal right to recover damages from the officials named as defendants.

(emphasis added). See *Memphis Community School Dist.* v. *Stachura,* 477 U.S. 299 (1986).[6]

3. This case does not provide an appropriate occasion, in any event, in which to consider what rights an attorney may have as such to be free from surveillance affecting his clients' Sixth Amendment rights. As noted above (p. 5, *supra*), petitioner's amended complaint, which was filed in 1971, provides absolutely no particulars regarding any such claim. Rather, after alleging that petitioner and his daughter had been the subject of warrantless electronic surveillance, the complaint states only that (C.A. App. A77):

> Such electronic surveillance further violates the rights of plaintiffs to effective assistance of counsel, to due process, to fair trial, to be free from unreasonable searches and seizures and the right of privacy in violation of the Fourth, Fifth, Sixth and Ninth Amendments to the Constitution of the United States, 18 U.S.C. §§ 2510-20, 47 U.S.C. § 605 and the attorney-client privilege.[7]

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[6] *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), does not support a claim for damages in this case. See Pet. 10. That case involved a criminal prosecution for teaching German, and raised no claim comparable to any that petitioner may conceivably assert in this case. The Court has since declined to rest on the "broad premise" of *Meyer*, on which petitioner relies here, that the Due Process Clause guarantees the liberty to "engage in any of the common occupations of life" (*Meyer* v. *Nebraska,* 262 U.S. at 399). See *Epperson* v. *Arkansas,* 393 U.S. 97, 105-106 (1968). The result in *Meyer* is now usually explained as reflecting the interest of the parents in that case in directing the education of their children. See, *e.g.*, *Moore* v. *East Cleveland,* 431 U.S. 494, 499, 501 (1977).

[7] The uncertainty in the nature of these claims is compounded by the fact that petitioner's daughter, Joanne Kinoy, joined as a plaintiff in the suit in her capacity as petitioner's client and a representative of other clients. Thus, it is impossible to discern from the face of the complaint whether the allegations of violations of rights under the

Under *Weatherford* v. *Bursey*, 429 U.S. 545 (1976), even a criminal defendant who seeks damages for surveillance allegedly violating his Sixth Amendment rights must demonstrate that the government has misused the fruits of that surveillance in his prosecution. In this case, although the government years ago produced logs of the intercepts in which petitioner was overheard, he has not yet identified any instance in which his representation of any client was affected by these intercepts. As the court of appeals found, petitioner did not even contend that the intercepts had been used against his clients until the hearing on the government's summary judgment motion in 1987. Pet. App. A5.

Thus, this case presents only the naked allegation, unsupported by specifics some 18 years after the suit was filed, that conversations intercepted in the course of national security surveillance of persons other than petitioner were later misused.[8] Ordinarily, this Court is reluctant to decide constitutional questions outside of a concrete factual setting. *E.g.*, *Socialist Labor Party* v. *Gilli-*

Fifth and Sixth Amendments refer to petitioner, as opposed to Joanne Kinoy. All of Joanne Kinoy's claims have been dismissed with prejudice pursuant to stipulation with the government. C.A. App. A397.

[8] Petitioner's contention that the government has improperly withheld discovery is groundless. In this case, the government produced thousands of documents, including wiretap logs itemizing each occasion on which petitioner was overheard (C.A. App. A227-A342), and provided petitioner with the names of persons having knowledge of the surveillance. The court upheld the government's claims of privilege, which were supported by affidavits of four Attorneys General. See C.A. App. A18, A48-A49. A plaintiff may not, by asserting vague claims and the need for discovery, play "dog in the manger" in response to a motion for summary judgment challenging the sufficiency of a *Bivens* claim. See *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978).

gan, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 569 (1947); *Ashwander* v. *TVA,* 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Even apart from the merits, therefore, the abstract nature of petitioner's claim makes this case inappropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1989

:: U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00095